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## The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons

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# **The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons**

## *Abstract*

*The Constitution grants the president the power to pardon individuals for offenses against the United States. Courts have interpreted this power broadly, and the American public has historically accepted its use, even in the face of several controversial pardons over the last five decades. However, after President Trump pardoned Joe Arpaio—a former Arizona sheriff who was held in criminal contempt of court for continuing to illegally detain suspected undocumented immigrants—scholars, activists, and political figures questioned whether this pardon was unconstitutional.*

*This Comment discusses the Court's interpretation of the pardoning power, controversial pardons in modern history, and the details of the Arpaio pardon and the public's response. After comparing the Arpaio pardon to previous pardons, analyzing constitutional arguments, and laying out the legal and political impact the pardon may have on the Trump Administration, this Comment ultimately concludes that the Arpaio pardon is constitutionally suspect, but the current Court is not likely to make any changes to the pardoning power's broad interpretation.*

TABLE OF CONTENTS

I.	INTRODUCTION .....	333
II.	BACKGROUND: THE HISTORY OF THE PRESIDENT'S PARDONING POWERS .....	335
	A. Ex parte Grossman .....	337
	B. <i>Remorse and Responsibility as Factors</i> .....	339
	C. <i>Controversial Acts of Clemency</i> .....	340
	1. President Ford's Pardoning of Former-President Nixon ...	340
	2. President Clinton's Pardoning of Roger Clinton and Marc Rich.....	341
	a. <i>Roger Clinton</i> .....	341
	b. <i>Marc Rich</i> .....	342
	3. President Obama Commuting Chelsea Manning's Sentence .....	343
	D. <i>Other Notable Acts of Clemency</i> .....	344
	1. President Carter Restoring Jefferson Davis's Citizenship .....	344
	2. President Reagan's Pardoning of W. Mark Felt and Edward S. Miller .....	345
III.	THE ARPAIO PARDON .....	346
	A. <i>Different Views on the Pardon</i> .....	347
	1. Activist Groups .....	347
	2. Congressional Members.....	349
	3. Academia .....	350
	4. Arpaio and the Department of Justice.....	352
IV.	ANALYSIS.....	353
	A. <i>Similarities and Differences with Previous Pardons</i> .....	353
	B. <i>Is It Constitutional?</i> .....	358
	C. <i>Legal and Political Impact</i> .....	362
V.	CONCLUSION.....	364

## I. INTRODUCTION

The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. — Publius, the Federalist Papers, No. 74<sup>1</sup>

[The President] may pardon all offenses, except in cases of impeachment, and the principal fountain of all offices and employments. Will not the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy or monarchy? — Cato, the Anti-Federalist Papers, No. 67<sup>2</sup>

While all agree the U. S. President has the complete power to pardon, why think of that when only crime so far is LEAKS against us. FAKE NEWS — President Trump, Tweet from July 22, 2017<sup>3</sup>

On August 25, 2017, President Trump pardoned Joe Arpaio, an Arizona sheriff held in criminal contempt of court after ignoring a court order to cease and desist detaining suspected undocumented immigrants.<sup>4</sup> Like many modern high-profile pardons, there was widespread debate and public outrage concerning the Arpaio pardon, and many people felt Arpaio deserved prison time.<sup>5</sup> However, some critics did not just disagree with President Trump's decision—they claimed it was unconstitutional.<sup>6</sup>

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1. THE FEDERALIST No. 74, at 415 (Alexander Hamilton) (Hallowell, Glazier & Co. 1826).

2. CATO ET AL., THE ANTI-FEDERALIST: LETTERS OF CATO NO. 4 (1787), *reprinted in* HACKETT PUB. COMPANY, INC., THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 58, 61 (David Wootan ed., 2003).

3. Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2017, 4:35 AM), <https://twitter.com/realdonaldtrump/status/888724194820857857?lang=en> [hereinafter Trump Tweet].

4. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), [www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html](http://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html).

5. See *infra* Sections III.A.1–3 (detailing responses from activists, academia, and members of Congress speaking out against the Arpaio pardon).

6. See, e.g., Proposed Brief of *Amicus Curiae* The Protect Democracy Project, Inc. at 2, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. 2017), 2017 WL 3773012 [hereinafter Protect Democracy Brief]; Laurence H. Tribe & Ron Fein, Opinion, *Trump's Pardon of Arpaio Can—and Should—Be Overturned*, WASH. POST (Sept. 18, 2017), [https://www.washingtonpost.com/opinions/the-presidential-pardon-power-is-not-absolute/2017/09/18/09d3497c-9ca5-11e7-9083-fb5dd6804c2\\_story.html](https://www.washingtonpost.com/opinions/the-presidential-pardon-power-is-not-absolute/2017/09/18/09d3497c-9ca5-11e7-9083-fb5dd6804c2_story.html) (“[A]lthough the conventional legal wisdom has been that a presidential decision to grant a pardon is unreviewable, that is wrong. In this circumstance, Trump’s decision to pardon Arpaio was unconstitutional and should be overturned.”).

The Constitution grants the president broad powers to pardon crimes committed against the United States.<sup>7</sup> The original intent was to put a check on the judiciary branch,<sup>8</sup> but modernly, it is known for allowing presidents to make highly unpopular grants of mercy.<sup>9</sup> Although most of these pardons fall within the limits of the Constitution and case law, several have pushed the boundaries of who can be pardoned.<sup>10</sup> Still, courts have chosen not to question whom a president pardons.<sup>11</sup> With each new controversial pardon, public debate about the scope of pardons resurfaces.<sup>12</sup> These same conversations occurred after Arpaio's pardon.<sup>13</sup>

However, legal scholars questioned whether this pardon was different.<sup>14</sup> Notably, Arpaio received a pardon for a criminal contempt of court charge, rather than for a guilty verdict handed down by a jury or judge.<sup>15</sup> Scholars discussed whether a pardon for a criminal contempt of court charge violated the separations of powers by limiting the courts power to bind individuals, including members of the other branches, to its decisions.<sup>16</sup> Others noted that

7. U.S. CONST. art. II, § 2, cl. 1 (noting that the president has discretion to grant pardons for any crimes against the United States, outside of cases of impeachment).

8. Walter F. Mondale, *Harnessing the President's Pardon Power*, 61 A.B.A. J. 107, 107 (1975) (stating that "the pardon power was originally intended . . . [to] check[] the abuses of the judiciary and the judicial system"). See, e.g., Hamilton, *supra* note 1 and accompanying text.

9. See *infra* Section II.C (discussing unpopular pardons granted by Presidents Ford, Clinton, and Obama).

10. See, e.g., Proclamation No. 4311, 39 Fed. Reg. 32601 (Sept. 10, 1974) [hereinafter Proclamation 4311] (granting a pardon to Richard Nixon after the Watergate Scandal); *An Indefensible Pardon*, N.Y. TIMES (Jan. 24, 2001), [www.nytimes.com/2001/01/24/opinion/an-indefensible-pardon.html](http://www.nytimes.com/2001/01/24/opinion/an-indefensible-pardon.html) (condemning President Clinton for pardoning Marc Rich, who was accused of tax evasion and fled to Switzerland, and stating "the president's authority under the Constitution to pardon anyone charged with federal crimes is meant to be exercised with great restraint to correct an injustice or to further some societal good").

11. See Tribe & Fein, *supra* note 6 (stating that courts generally do not review pardons).

12. Compare *An Indefensible Pardon*, *supra* note 10, with Noah Feldman, Opinion, *Arpaio Pardon Would Show Contempt for Constitution*, BLOOMBERG (last updated Aug. 26, 2017, 1:17 PM), <https://www.bloomberg.com/view/articles/2017-08-23/arpaio-pardon-would-show-contempt-for-constitution> (arguing that if Trump pardoned Arpaio, he would be "willfully refusing to follow the Constitution").

13. See Protect Democracy Brief, *supra* note 6 and accompanying text.

14. See Feldman, *supra* note 12 ("[I]t would be an altogether different matter if Trump pardoned Arpaio for willfully refusing to follow the Constitution and violating the rights of people inside the U.S."); Andrew Rudalevige, *Why Trump's Pardon of Joe Arpaio Isn't Like Most Presidential Pardons*, WASH. POST. (Aug. 26, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/26/why-trumps-pardon-of-joe-arpaio-isnt-like-most-presidential-pardons/> (noting that President Trump's pardon did not fit the categories for awarding a pardon).

15. See Feldman, *supra* note 12.

16. See *supra* note 6 and accompanying text.

the pardon violated the due process of those illegally detained by Arpaio because the pardon protected him from any federal proceedings related to his crime.<sup>17</sup>

This Comment discusses the Arpaio pardon and whether it fits within the broad presidential pardon framework set out by the Constitution and reinforced by the courts.<sup>18</sup> Part II of this Comment discusses the history of presidential pardoning, examining relevant case law and exploring controversial pardons of past presidents.<sup>19</sup> Part III looks at the response to the Arpaio pardon from various groups, including activists, academia, and the government.<sup>20</sup> Part IV analyzes the claims brought against the Arpaio pardon, exploring its similarities and differences with other pardons, its constitutionality, and the impacts of the pardon on the Trump Administration.<sup>21</sup> Part V concludes, finding that although this pardon likely does infringe on constitutional rights, the current Court is not willing to examine or narrow the modern understanding of the president's pardoning power.<sup>22</sup>

## II. BACKGROUND: THE HISTORY OF THE PRESIDENT'S PARDONING POWERS

The President's power to pardon is permitted under the United States Constitution.<sup>23</sup> Article II, Section 2 reads, "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."<sup>24</sup> This power to pardon has been extended broadly by the courts, allowing the president practically unrestricted power to pardon any crime within the federal courts.<sup>25</sup> As noted above, the pardoning power only extends to federal crimes or, as the Constitution puts it, "Offences against the United States."<sup>26</sup> This means that the president does not have the power

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17. Martin H. Redish, Opinion, *A Pardon for Arpaio Would Put Trump in Uncharted Territory*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/opinion/trump-arpaio-pardon-arizona-sheriff.html> ("If a particular exercise of the pardon power leads to a violation of the due process clause, the pardon power must be construed to prevent such a violation.").

18. See *infra* Part IV.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. U.S. CONST. art. II, § 2, cl. 1.

24. *Id.*

25. *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("The power [to pardon] thus conferred is unlimited, with the exception stated.").

26. U.S. CONST. art. II, § 2, cl. 1.

to pardon crimes brought under state law.<sup>27</sup>

Derived from the English king's pardoning power,<sup>28</sup> the presidential pardoning power is expansive and nearly unrestricted.<sup>29</sup> One of the earliest Supreme Court cases dealing with the scope of the pardoning power is *Ex parte Garland*.<sup>30</sup> In *Garland*, the Court highlighted the expansiveness of the power by stating:

The [pardoning] power thus conferred is unlimited, with the exception [of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.<sup>31</sup>

These broad boundaries have made the pardoning power nearly impossible to challenge.<sup>32</sup> The Court has continued to clarify just how broad the power is by reaffirming its power in several court proceedings, finding the

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27. *Ex parte Grossman*, 267 U.S. 87, 113 (1925) (clarifying that "Offences against the United States" was intended to "distinguish[] from offenses against the States"). Each state is able to determine whether it will allow pardons and who can pardon, such as the state's governor. *Pardon Information and Instructions*, U.S. DEP'T OF JUST. (last updated Oct. 12, 2017), <https://www.justice.gov/pardon/pardon-information-and-instructions>. Legal scholars Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar also argue in their proposed *amici curiae* brief that criminal contempt of court charges are not "Offences against the United States," but instead, separate judicial actions to "protect litigant rights and the court's own processes." [Proposed] Memorandum of *Amici Curiae* Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar at 6, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. July 31, 2017), 2017 U.S. Dist. LEXIS 214888 [hereinafter Chemerinsky Brief].

28. Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228 (2003) ("The President's pardon power derives from the authority that had been invested in English kings since the end of the first millennium.").

29. See *infra* notes 31–36 and accompanying text.

30. 71 U.S. 333 (1866).

31. *Id.* at 380.

32. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 535 (1977) (stating that Congress and the courts are unable to challenge the motives of a pardon); Adam Liptak, *Why Trump's Pardon of Arpaio Follows Law, Yet Challenges It*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/us/politics/trump-pardon-joe-arpaio-constitution.html> ("[The Arpaio pardon] was almost certainly lawful. The Constitution gives presidents extremely broad power to grant pardons.").

pardoning power constitutional in situations involving treason and rebellion,<sup>33</sup> foreign subjects,<sup>34</sup> protection from impeachment,<sup>35</sup> and even instances when the individual does not want to be pardoned.<sup>36</sup>

#### A. *Ex parte Grossman*

When examining the pardoning power in the context of contempt of court,<sup>37</sup> one case has particular importance.<sup>38</sup> *Ex parte Grossman* was a 1925 Supreme Court case involving Philip Grossman, who was charged with selling liquor in his house during the Prohibition Era and given a restraining order to enjoin him from continuing to sell liquor.<sup>39</sup> Despite the restraining order, Grossman continued to sell liquor and was found in criminal contempt.<sup>40</sup> Grossman was tried, found guilty, and sentenced to one-year imprisonment and a fine of \$1,000.<sup>41</sup> President Calvin Coolidge commuted Grossman's sentence to only paying the \$1,000 fine, and Grossman complied and was released.<sup>42</sup> However, a district court judge ignored the pardon and sent Grossman to prison to serve his sentence.<sup>43</sup>

Chief Justice Taft delivered the opinion of the Supreme Court, finding the

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33. *Garland*, 71 U.S. at 375–77 (discussing the President's ability to pardon individuals who have committed treason and rebellion during the Civil War).

34. *Carlisle v. United States*, 83 U.S. 147, 155–56 (1872) (involving British subjects who had land confiscated during the Civil War).

35. *Nixon v. United States*, 506 U.S. 224, 232 (1993) (“[T]he granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is ‘an executive action that mitigates or sets aside *punishment* for a crime.’ . . . The exception from the President's pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases.” (quoting *Pardon*, BLACK'S LAW DICTIONARY 1113 (6th ed. 1990))).

36. *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927) (noting that a pardon can be given, even if the pardon-seeker rejects the pardon, and that the purpose of a pardon is “that the public welfare will be better served by inflicting less than what the judgment fixed”). *But see* *Burdick v. United States*, 236 U.S. 79, 90–91 (1915) (stating that a pardon does not go into effect until the individual accepts it). Individuals may not want a pardon because if an individual accepts a pardon, he or she is accepting guilt. *Id.* at 94 (“[A pardon] carries an imputation of guilt; acceptance a confession of it.”).

37. Defined as “[a]n act that obstructs justice or attacks the integrity of the court. . . . The purpose of criminal-contempt proceedings is to punish repeated or aggravated failure to comply with a court order.” *Criminal Contempt*, BLACK'S LAW DICTIONARY 385 (10th ed. 2014).

38. *See infra* note 39.

39. *Ex parte Grossman*, 267 U.S. 87, 107 (1925).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*



president has the right to pardon, even in criminal contempt cases.<sup>44</sup> The Court dismissed the argument that a contempt charge is not an offense against the United States, stating “the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions.”<sup>45</sup> It clarified that “Offences against the United States” only meant the President could not pardon *state* crimes.<sup>46</sup> The Court did note that civil contempt of court cannot be pardoned because “the punishment is remedial and for the benefit of the complainant.”<sup>47</sup>

Taft explained, “Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”<sup>48</sup> Pardoning power, particularly when used to overrule a contempt of court, did not deteriorate the balance of power between the judicial and executive branches, but rather was an important part of this historical balance.<sup>49</sup> A pardon allowed the President to check the judicial power and “[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.”<sup>50</sup> Taft made a point to say that if the people did not want the President to have this power and were worried that he would abuse it, then the correct remedy was to impeach him, not for the courts to ignore his pardon.<sup>51</sup>

It is interesting to note two things about the Taft Court.<sup>52</sup> First, Chief Justice Taft, who delivered the opinion, was a former president.<sup>53</sup> Second, the

44. *Id.* at 122; *see also* Rice Lardner, *Executive Pardon for Contempt of Court*, 2 ROCKY MNTN. L. REV. 137, 137 (1930) (noting that state courts, the Attorney General, and federal courts all agreed that the President can pardon in criminal contempt cases).

45. *Grossman*, 267 U.S. at 111.

46. *Id.* at 113; *see supra* note 27 and accompanying text (discussing states’ rights to choose if and how state crimes can be pardoned).

47. *Grossman*, 267 U.S. at 111.

48. I will call these factors the “Taft Test.” *Id.* at 120. Former U.S. Deputy Solicitor General of the Department of Justice (DOJ), Philip Allen Lacovara, states that the Founding Fathers meant for pardons to be used “to extend mercy to those who have offended and have demonstrated remorse.” Philip Allen Lacovara, Opinion, *How the Pardon Power Could End Trump’s Presidency*, WASH. POST (Aug. 29, 2017), [https://www.washingtonpost.com/opinions/how-the-pardon-power-could-end-trumps-presidency/2017/08/29/57365dfc-8cf7-11e7-84c0-02cc069f2c37\\_story.html](https://www.washingtonpost.com/opinions/how-the-pardon-power-could-end-trumps-presidency/2017/08/29/57365dfc-8cf7-11e7-84c0-02cc069f2c37_story.html).

49. *Grossman*, 267 U.S. at 120; *see Duker, supra* note 32, at 536 (noting that the pardoning power was given to the Executive Branch to place a check on the other branches).

50. *Grossman*, 267 U.S. at 121.

51. *Id.* Also note the use of the male pronoun in reference to the president is only meant to reflect the language of Chief Justice Taft. *See id.*

52. *See infra* notes 53–54.

53. FRANK FREIDEL & HUGH SIDEY, *THE PRESIDENTS OF THE UNITED STATES OF AMERICA* (Diane Publ’g Co. 13th ed. 2006); *see also* Lardner, *supra* note 44, at 149 (stating Chief Justice Taft “has unbounded faith in the integrity of the president” because he “enjoyed such a high reputation for

Court was part of one of the most conservative eras in Supreme Court history.<sup>54</sup> During the decade after the *Grossman* decision, the Court dynamic drastically changed to what has been termed the “Roosevelt Court.”<sup>55</sup> The Roosevelt Court was noticeably more liberal than the previous Courts and overthrew some of the more conservative decisions of the Taft and former Courts.<sup>56</sup> Although neither of these facts invalidate the decision of the Taft Court, it does provide insight into the Court’s decision and whether the Court will revisit this decision in the future, reshaping the Court’s view of the pardoning power.<sup>57</sup>

### *B. Remorse and Responsibility as Factors*

Beyond the Taft Test, courts and the Executive Branch have considered remorse or taking responsibility as important factors in determining whether to issue a pardon.<sup>58</sup> For example, the Department of Justice Office of the Pardon Attorney, which assists the President in issuing executive grants of clemency, notes “[t]he extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations.”<sup>59</sup> This correlates with the contention that accepting a pardon indicates a presumption of guilt.<sup>60</sup> However, remorse is not a requirement to receive a pardon, and many of the individuals who have received the most controversial pardons have not shown remorse.<sup>61</sup>

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integrity and fair dealing . . . [that] he cannot conceive of any one else debasing the presidency”).

54. Russell W. Galloway, Jr., *The Roosevelt Court: The Liberals Conquer (1937–1941) and Divide (1941–1946)*, 23 SANTA CLARA L. REV. 491, 491 (1983) (“[F]rom roughly 1890 to 1937 the Supreme Court was usually dominated by conservative Justices . . .”).

55. *See id.*

56. *See id.* at 492–93.

57. *See infra* text accompanying note 241.

58. *See* Lacovara, *supra* note 48 (stating that the Founding Fathers intended for pardons “to extend mercy to those who have offended and have demonstrated remorse”).

59. *Standards for Consideration of Clemency Petitioners*, U.S. DEP’T OF JUST. (last updated Sept. 21, 2018), <https://www.justice.gov/pardon/about-office-0> [hereinafter *Standards for Consideration*].

60. *Burdick v. United States*, 236 U.S. 79, 94 (1915) (“[A pardon] carries an imputation of guilt; acceptance a confession of it.”).

61. *See Standards for Consideration*, *supra* note 59 (stating that the office considers, but does not require, remorse and taking responsibility).

*C. Controversial Acts of Clemency*

Although the Court has made it clear that presidential pardons and other acts of clemency are constitutionally valid in nearly every circumstance, this does not mean the public as a whole has willingly accepted all presidential pardons; some pardons are widely criticized.<sup>62</sup> Public outrage is not enough to overturn these pardons, but the following pardons demonstrate that public backlash over a presidential pardon is nothing new.<sup>63</sup>

## 1. President Ford's Pardoning of Former-President Nixon

Shortly after President Nixon resigned from office in relation to the Watergate scandal, President Ford gave President Nixon a full and complete pardon.<sup>64</sup> The pardon's language read:

I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.<sup>65</sup>

President Ford's pardon was aimed at excusing Nixon from the ongoing proceedings around his connection to the burglary at the Democratic Party Committee headquarters.<sup>66</sup> In his pardon, President Ford claimed that this pardon was necessary to stop any "further punishment and degradation [to] a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States."<sup>67</sup>

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62. See Duker, *supra* note 32, at 535; *infra* Sections III.A.1–3. Presidents issue numerous pardons during their terms, many of which are never heard about or mentioned. See, e.g., *Pardons Granted by President Barack Obama (2009–2017)*, U.S. DEP'T OF JUST. (last updated July 11, 2018), [www.justice.gov/pardon/obama-pardons](http://www.justice.gov/pardon/obama-pardons).

63. See *infra* Sections II.C.1–3.

64. *Watergate Fast Facts*, CNN (last updated Sept. 24, 2018, 9:30 PM), <http://edition.cnn.com/2014/01/23/us/watergate-fast-facts/index.html>. The Watergate scandal connected President Nixon to five men who broke into the Democratic National Committee headquarters in the 1970s. *Id.*

65. Proclamation 4311, *supra* note 10.

66. See *Watergate Fast Facts*, *supra* note 64.

67. Proclamation 4311, *supra* note 10.

The public was not happy about President Ford's pardon or the language that it used.<sup>68</sup> Unlike other pardons that only commute or reduce sentences, President Ford's pardon stopped proceedings and prevented any additional investigations or discovery into wrongdoing by President Nixon for the given time period.<sup>69</sup> Thus, this pardon not only excused the punishment that President Nixon might have received, but also limited any further tarnish to President Nixon's reputation by effectively stopping investigations into his conduct.<sup>70</sup> This also appears to be a loophole around the clause stating that pardons cannot be used "in Cases of Impeachment."<sup>71</sup> Although Nixon did not create the pardon, he was able to stop his punishment because, by resigning, he could not be impeached.<sup>72</sup> While this loophole effectively does the job of impeachment by requiring the President to remove himself from office, it does show that presidents can be protected against additional punishments that may come from an impeachment proceeding.<sup>73</sup>

## 2. President Clinton's Pardoning of Roger Clinton and Marc Rich

### a. *Roger Clinton*

Presidential pardoning powers also extend beyond the rules against nepotism.<sup>74</sup> In 2001, President Clinton pardoned his brother, Roger Clinton, for time that he had already served ten years prior for drug-related offenses.<sup>75</sup> Although Roger Clinton served his time and thus, did not have his sentence commuted or shortened by the pardon, it did clear his criminal record and any existing punishments that can come from a drug-related offense on one's criminal record.<sup>76</sup>

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68. Hon Herbers, *Ford Gives Pardon to Nixon, Who Regrets 'My Mistakes'*, N.Y. TIMES (Sept. 8, 1974), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0908.html>.

69. *See id.*

70. *See* Proclamation 4311, *supra* note 10 ("[T]he prospects of such trial will cause prolonged and divisive debate over the propriety of *exposing* to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the [Presidency].") (emphasis added).

71. U.S. CONST. art. II, § 2, cl. 1.

72. *See* Proclamation 4311, *supra* note 10.

73. *See id.*

74. *See generally infra* Section II.C.2.a.

75. *See Pardons Granted by President William J. Clinton (1993–2001)*, U.S. DEP'T OF JUST. (last updated Sept. 8, 2015), [www.justice.gov/pardon/clinton-pardons](http://www.justice.gov/pardon/clinton-pardons) [hereinafter *Clinton Pardons*].

76. Philip Bump, *Millennials, Meet Roger Clinton: Hillary's Brother-in-Law Who Just Got Arrested Once Again*, WASH. POST (June 6, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/06/06/millennials-meet-roger-clinton-hillarys-brother-in-law-who-just-got-arrested->

While there was some public discontent about Roger Clinton's pardon, the real scandal surrounded his attempt to influence President Clinton's pardons in exchange for money.<sup>77</sup> Before President Clinton issued his last pardons, Roger Clinton sent a letter to his brother with recommendations of people who should be pardoned, including Rosario Gambino, who was serving a forty-five-year sentence for heroin trafficking.<sup>78</sup> Although President Clinton did not pardon any individuals on that list, it raised questions of how the Presidential pardoning power can and should be used.<sup>79</sup>

*b. Marc Rich*

This question of how the presidential pardoning power can and should be used was front and center in President Clinton's pardon of Marc Rich in 2001.<sup>80</sup> Marc Rich was accused of, among other things, "[w]ire fraud, mail fraud, racketeering, racketeering conspiracy, criminal forfeiture, income tax evasion, [and] trading with Iran in violation of trade embargo."<sup>81</sup> Mr. Rich had close ties to several dictators and the Soviet Union, and when federal prosecutors were pursuing him in 1983, he fled to Switzerland.<sup>82</sup>

However, on the last day of his presidency, President Clinton pardoned Mr. Rich of his crimes—an act that outraged many Americans.<sup>83</sup> The New York Times ran an op-ed several days later calling it "[a]n [i]ndefensible [p]ardon" and "a reminder of why George W. Bush's vow to restore integrity

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once-again (noting that Roger Clinton did not have a criminal record for selling cocaine after President Clinton pardoned him).

77. Alison Leigh Cowan, *Roger Clinton's Dogged Effort for Drug Trafficker*, N.Y. TIMES (Aug. 26, 2001), <http://www.nytimes.com/2001/08/26/us/roger-clinton-s-dogged-effort-for-drug-trafficker.html>.

78. *Id.*

79. *See id.*

80. *See Clinton Pardons*, *supra* note 75.

81. *Id.* Marc Rich fled with his business partner, Pincus Green, who was accused of the same crimes and was also pardoned by President Clinton. George Lardner Jr., *Opinion, A Pardon to Remember*, N.Y. TIMES (Nov. 24, 2008), <http://www.nytimes.com/2008/11/22/opinion/22lardner.html>.

82. *See An Indefensible Pardon*, *supra* note 10 and accompanying text; Aaron Lucchetti et al., *While Marc Rich Was Fugitive, Firm Dealt with Pariah Nations*, WALL ST. J. (last updated Feb. 23, 2001, 12:01 A.M.), <https://wsj.com/articles/SB982885815892990443>.

83. *See An Indefensible Pardon*, *supra* note 10; *see also* E.J. Dionne, *Bill Clinton's Last Outrage: The President's Defenders Feel Betrayed by His Pardon of Marc Rich*, THE BROOKINGS INSTITUTION (Feb. 6, 2001), <https://www.brookings.edu/opinions/bill-clintons-last-outrage-the-presidents-defenders-feel-betrayed-by-his-pardon-of-marc-rich/> (quoting former U.S. Representative Barney Frank as saying, "It was a real betrayal by Bill Clinton of all who had been strongly supportive of him to do something this unjustified [referring to the Rich pardon]. It was contemptuous.").

to the Oval Office resonates with millions of Americans who otherwise disagree with the new president's politics."<sup>84</sup> Although President Clinton did not have to worry about re-election, it was still curious why he would risk his reputation for an individual that both sides of the political spectrum did not like.<sup>85</sup> In response to the complaints, President Clinton wrote his own op-ed in the New York Times almost a month later to defend his actions.<sup>86</sup> He provided eight justifications for his pardon, including that others vetted his decision and alleging that there was a chance Mr. Rich was innocent of some of the charges.<sup>87</sup> Many people remained skeptical and looked to Mr. Rich's ex-wife as the reason for the pardon—she donated large amounts of money to the Clinton Library and to the Democratic Party during the Clinton Presidency.<sup>88</sup>

This pardon highlights how broad the president's pardoning power is and how it has departed from the initial purposes the Court previously supported.<sup>89</sup> In *Ex parte Grossman*, Taft stated that pardons were meant to provide relief where the judiciary had been too harsh.<sup>90</sup> However, in this case, Mr. Rich evaded justice when he fled to Switzerland.<sup>91</sup> The justifications could hardly be that justice was served or that the pardon prevented undue harshness; yet, it was never overturned for being unconstitutional.<sup>92</sup>

### 3. President Obama Commuting Chelsea Manning's Sentence

In January 2017, several days before the end of his last term, President Obama granted clemency to Chelsea Manning by commuting all but four months of her remaining sentence.<sup>93</sup> Ms. Manning was convicted for passing

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84. *An Indefensible Pardon*, *supra* note 10.

85. *See id.*; *see also* Lardner, *supra* note 81 (noting that "usually loyal Democrats were dismayed" by President Clinton's decision to pardon Marc Rich).

86. William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html>.

87. *Id.*

88. *See An Indefensible Pardon*, *supra* note 10; James V. Grimaldi, *Denise Rich Gave Clinton Library \$450,000*, WASH. POST (Feb. 10, 2001), <https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/>.

89. *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (noting that the pardons should be used in cases when the pardon-seeker shows remorse and there has been undue hardship or evident mistake).

90. *See id.*

91. *See An Indefensible Pardon*, *supra* note 10.

92. *See id.*

93. Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), [www.nytimes.com/2017/01/17/us/politics/obamacommutates-bulk-of-chelsea-mannings-sentence.html](http://www.nytimes.com/2017/01/17/us/politics/obamacommutates-bulk-of-chelsea-mannings-sentence.html).

confidential information from the U.S. military to the creator of WikiLeaks and sentenced to thirty-five years in prison.<sup>94</sup> By the time President Obama commuted her sentence, Ms. Manning had served nearly seven years, which made President Obama “feel very comfortable that justice ha[d] been served.”<sup>95</sup> Returning to Chief Justice Taft’s idea that pardons are appropriate to prevent undue harshness, President Obama stated: “Let’s be clear: Chelsea Manning has served a tough prison sentence. . . . The notion that the average person who is thinking about disclosing vital classified information would think that it goes unpunished . . . I don’t think would get that impression from the sentence that Chelsea Manning has served.”<sup>96</sup>

While Democrats and Republicans felt that commuting the sentence was inappropriate in light of Ms. Manning’s crimes, none questioned whether President Obama had the right to do it.<sup>97</sup>

#### *D. Other Notable Acts of Clemency*

##### 1. President Carter Restoring Jefferson Davis’s Citizenship

On October 17, 1978, President Carter signed a congressional resolution that restored Jefferson Davis’s citizenship, which was terminated during the Civil War.<sup>98</sup> President Carter stated that some Confederate officials already had their citizenship restored and that it did not make sense to continue to single out Jefferson Davis.<sup>99</sup> He concluded:

Our Nation needs to clear away the guilts and enmities and recriminations of the past, to finally set at rest the divisions that threatened to destroy our Nation and to discredit the principles on which it was

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94. Wikileaks, founded by Julian Assange, is an organization that releases classified information. *Id.*

95. Sabrina Siddiqui & Ed Pilkington, *Barack Obama: ‘Justice Served’ by Chelsea Manning Commutation*, THE GUARDIAN (Jan. 19, 2017, 2:24 A.M.), <https://www.theguardian.com/us-news/2017/jan/18/barack-obama-final-press-conference-chelsea-manning>.

96. *Id.*; see also *Grossman*, 267 U.S. at 120 (discussing using pardons to prevent undue harshness or correct evident mistake).

97. See Jordain Carney, *Manning Commutation Sparks Democratic Criticism*, THE HILL (Jan. 18, 2017, 6:52 PM), <http://thehill.com/blogs/floor-action/senate/314977-manning-commutation-sparks-criticism-from-democrats>; Siddiqui & Pilkington, *supra* note 95.

98. Jimmy Carter, *Restoration of Citizenship Rights to Jefferson F. Davis Statement on Signing S. J. Res. 16 into Law*, THE AM. PRESIDENCY PROJECT (Oct. 17, 1978), <http://www.presidency.ucsb.edu/ws/?pid=29993>.

99. See *id.* (noting that Robert E. Lee’s citizenship was restored in 1976).

founded. Our people need to turn their attention to the important tasks that still lie before us in establishing those principles for all people.<sup>100</sup>

## 2. President Reagan's Pardoning of W. Mark Felt and Edward S. Miller

On March 26, 1981, President Reagan pardoned W. Mark Felt and Edward S. Miller, two FBI officials found guilty of illegally authorizing government officials to break into the houses of family and friends of members of the Weather Underground terrorist group.<sup>101</sup> In his pardon, President Reagan stated that Felt and Mark “served the [FBI] and our nation with great distinction” and “[t]o punish them further—after 3 years of criminal prosecution proceedings—would not serve the ends of justice.”<sup>102</sup> President Reagan noted that Felt and Miller did not act with criminal intent, but “out of their good-faith belief that their actions were necessary to preserve the security interests of our country” and “in the belief that they had grants of authority reaching to the highest levels of government.”<sup>103</sup>

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In light of both the legal and political history of all of these presidential pardons, one thing is certain—pardons are nearly always permitted.<sup>104</sup> The courts and the general public seem to agree that, although they may not like a particular pardon, it is a power that the president has and can use.<sup>105</sup> However, with President Clinton's pardon of Marc Rich, there was a sign that presidents may be moving away from the Court's justifications for presidential pardons.<sup>106</sup> Today, many believe the Arpaio pardon is different from the past

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100. *Id.*

101. See Robert Pear, *President Reagan Pardons 2 Ex-F.B.I. Officials in 1970's Break-Ins*, N.Y. TIMES (April 16, 1981), <http://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html>.

102. Ronald Reagan, *Statement on Granting Pardons to W. Mark Felt and Edward S. Miller*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (April 15, 1981), <https://www.reaganlibrary.gov/41581d>.

103. *Id.*

104. See Lardner, *supra* note 44, at 137 (arguing that the decision in *Grossman* “would seemingly vest in [the President] the ultimate decision in all cases, involving disobedience to the courts’ orders or acts done in contravention of the courts’ powers, except of course in civil contempt proceedings where the rights of third parties are involved”) (footnote omitted).

105. See *id.*

106. See *supra* Section II.C.2.b.



pardons and in need of more scrupulous review.<sup>107</sup> In order to determine if the Arpaio pardon truly is different from other pardons, it is important to take a closer look at the pardon, as well as the public's response to the pardon and the arguments for and against President Trump's executive power to pardon Arpaio.<sup>108</sup>

### III. THE ARPAIO PARDON

Joe Arpaio, a former Arizona sheriff, received an injunction to stop illegally detaining suspected undocumented immigrants.<sup>109</sup> However, Arpaio did not obey the injunction,<sup>110</sup> and on July 31, 2017, a judge found Arpaio in criminal contempt of court.<sup>111</sup> Despite objections,<sup>112</sup> President Trump granted Arpaio a pardon on August 25, 2017, stating: "[A]fter more than fifty years of admirable service to [the] Nation, he is worthy [sic] candidate for a Presidential pardon."<sup>113</sup> Arpaio responded in a tweet: "Thank you @realdonaldtrump for seeing my conviction for what it is: a political witch hunt by holdovers in the Obama justice department!,"<sup>114</sup> a sign that Arpaio (and perhaps President

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107. See *infra* Section III.A.

108. See *infra* Part III.

109. See Davis & Haberman, *supra* note 4. In 2007, Arpaio and the Maricopa County Sheriff's Office were found guilty in U.S. district court of setting up illicit traffic stops and using racial profiling against Latinos to find undocumented immigrants. *Ortega Melendres, et al. v. Arpaio, et al.*, ACLU (Sept. 13, 2017), <https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al> [hereinafter *Ortega Melendres*]. In October 2013, the court found continued misconduct and violations of individuals' constitutional rights by Arpaio and the Sheriff's Office. See *id.* Finally, in May 2016, the court held Arpaio and his top deputies in criminal contempt of court for continuing to violate the court order. *Id.*

110. *Ortega Melendres, supra* note 109.

111. *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*7 (D. Ariz. July 31, 2017).

112. See *infra* Sections III.A.1–3.

113. *President Trump Pardons Sheriff Joe Arpaio*, THE WHITE HOUSE (August 25, 2017), <https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio/> [hereinafter *Arpaio Pardon*]. This justification for a pardon differs from those the courts have used. See generally *supra* Part II. According to past precedent, a pardon should not be granted simply for the number of years the individual has worked in the government, but rather to prevent "undue harshness or evident mistake . . ." *Ex parte Grossman*, 267 U.S. 87, 120 (1925). Arpaio ran for Arizona Senate and stated he was running "to support the agenda and policies of President Donald Trump in his mission to Make America Great Again." Eric Bradner, *Joe Arpaio, Controversial Sheriff Pardoned by Trump, Enters Arizona Senate Race*, CNN (Jan. 9, 2018, 4:13 PM), <http://www.cnn.com/2018/01/09/politics/arizona-senate-joe-arpaio/index.html>.

114. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Aug. 25, 2017, 6:07 PM), <https://twitter.com/realsheriffjoe/status/901249811743035393?lang=en> [hereinafter *Arpaio Tweet*].

Trump)<sup>115</sup> did not believe he committed a crime.<sup>116</sup> A federal judge approved the pardon on October 19, 2017.<sup>117</sup> Before and after the pardon, questions and views about the legality of the pardon have surfaced.<sup>118</sup>

### *A. Different Views on the Pardon*

#### *1. Activist Groups*

Before the pardon was issued, activist groups came out opposing the pardon, including the American Civil Liberties Union (ACLU),<sup>119</sup> Human Rights Watch,<sup>120</sup> and The Leadership Conference.<sup>121</sup> The ACLU issued a petition, which garnered over 100,000 signatures, requesting that the then-White House Counsel and Assistant to the President, Don McGahn, stop the President from pardoning Arpaio.<sup>122</sup> The ACLU issued an update to the petition, after the pardon was granted, stating that “[t]his [pardon] is a presidential endorsement of racism,” and the group pledged to “continue to fight against the injustices that Arpaio and the Trump [A]dministration perpetuate against immigrants and people of color.”<sup>123</sup>

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115. See *Arpaio Pardon*, *supra* note 113 (commending Arpaio on “his life’s work of protecting the public from the scourges of crime and illegal immigration”).

116. Note that although Arpaio blames “holdovers in the Obama” Administration for his arrest, several judges appointed by President George W. Bush, a Republican, have criticized and ruled against Arpaio for his violation of the law. See Arpaio Tweet, *supra* note 114; James Fallows, *Why the Arpaio Pardon Matters*, THE ATLANTIC, (Aug. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-the-arpai-pardon-matters/538131/>.

117. Bill Chappell, *Federal Judge Will Not Void Guilty Ruling on Arpaio, Despite Trump’s Pardon*, NPR (Oct. 20, 2017, 8:10 AM), <https://www.npr.org/sections/thetwo-way/2017/10/20/558978896/federal-judge-will-not-void-guilty-ruling-on-arpai-despite-trumps-pardon>. However, Arpaio did try to get the entire case and conviction wiped from his record but was unsuccessful. *Id.* Although the judge, U.S. District Judge Susan Bolton, agreed that the pardon protected Arpaio from any prison time, she noted that it did not “revise the historical fact[] [that Arpaio was found guilty of criminal contempt].” *Id.* For more on Arpaio’s request, see Section III.A.4.

118. See *infra* Section III.A.

119. Petition, *Stop Trump from Pardoning Joe Arpaio*, ACLU (Aug. 25, 2017), <https://action.aclu.org/secure/dont-pardon-arpai> [hereinafter ACLU Petition].

120. *US: Trump Should Reject Arpaio Pardon*, HUMAN RIGHTS WATCH (Aug. 23, 2017, 9:54 AM), <https://www.hrw.org/news/2017/08/23/us-trump-should-reject-arpai-pardon> [hereinafter HUMAN RIGHTS WATCH].

121. Vanita Gupta, *Civil and Human Rights Coalition: Trump Must Not Pardon Sheriff Arpaio*, THE LEADERSHIP CONFERENCE (Aug. 21, 2017), <https://civilrights.org/civil-human-rights-coalition-trump-must-not-pardon-sheriff-arpai/>.

122. See ACLU Petition, *supra* note 119.

123. *Id.*

Human Rights Watch, an international nonprofit human rights organization, also described the pardon as “effectively endors[ing] racial discrimination by law enforcement.”<sup>124</sup> Beyond ignoring the offenses that Arpaio was found guilty of, Human Rights Watch argued the pardon obstructs the victims’ protections under international human rights law.<sup>125</sup> The group points to Article 2 of the International Covenant on Civil and Political Rights, which requires countries to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>126</sup> A pardon effectively removes an injured party’s remedy.<sup>127</sup> Regardless that Arpaio was a public official, the United Nations Human Rights Committee insists that perpetrators should be held personally responsible.<sup>128</sup>

Vanita Gupta, the former head of the Department of Justice (DOJ) Civil Rights Division and current president and CEO of The Leadership Conference on Civil and Human Rights,<sup>129</sup> urged President Trump to not pardon Arpaio: “If President Trump uses his power to pardon a discredited law enforcement official who persistently engaged in illegal racial profiling of the Latino community, it will not be a dog whistle to the so-called ‘alt right’ and white supremacists, but a bull horn.”<sup>130</sup>

Some civil rights groups have also taken action against the pardon.<sup>131</sup> For example, Protect Democracy, a nonpartisan and nonprofit group with the mission “to prevent our democracy from declining into a more authoritarian form of government,”<sup>132</sup> filed an amicus brief in Arpaio’s case and alleged that the pardon was unconstitutional.<sup>133</sup> In its brief, Protect Democracy argued three points: (1) the pardon violated the Due Process Clause of the Fifth Amendment;<sup>134</sup> (2) the pardon exceeded the President’s pardoning power; and (3) the

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124. HUMAN RIGHTS WATCH, *supra* note 120.

125. *See id.*

126. *Id.* (citing United Nations International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 172).

127. *See id.*

128. *See id.*

129. The Leadership Conference on Civil and Human Rights is a coalition of over 200 human and civil rights groups in the United States. *About Us*, THE LEADERSHIP CONFERENCE, <https://civil-rights.org/about-us/> (last visited Oct. 5, 2018).

130. *See* Gupta, *supra* note 121.

131. *See, e.g.*, Protect Democracy Brief, *supra* note 6.

132. *What is Protect Democracy?*, PROTECT DEMOCRACY, <https://protectdemocracy.org/about> (last visited Oct. 5, 2018).

133. Protect Democracy Brief, *supra* note 6, at 1.

134. *Id.* at 3; *see* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or

pardon violated the separation of powers by interfering “with the inherent powers of the Judicial Branch.”<sup>135</sup> Most notably, the brief argued that powers vested in the Constitution cannot violate later amendments (such as the Due Process Clause).<sup>136</sup> The fact that the additional amendments came after the pardoning power is also, according to Protect Democracy, the reason the pardoning power may seem unlimited—the Framers kept the powers within the articles broad, knowing amendments could be made to narrow the scope, if necessary.<sup>137</sup>

## 2. Congressional Members

After the pardon was announced, more than thirty democratic House members urged the federal courts to reject the pardon.<sup>138</sup> The group of Democrats filed an amicus brief arguing, similarly to Protect Democracy, that the pardon interferes with the Judicial Branch’s powers.<sup>139</sup> The brief reads, “[T]he pardon here is an intentional usurpation of the Court’s authority by the President. President Trump does not pretend that his pardon of the Defendant is based upon the considerations of grace that usually justify the exercise of the pardon power.”<sup>140</sup> The brief argues that beyond using the pardoning power improperly, the Executive Branch is acting in a supervisory role over the Judicial Branch, and, that by limiting the court’s contempt power, the Executive Branch is stripping the courts of their power to enforce decisions.<sup>141</sup>

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property, without due process of law . . .”).

135. Protect Democracy Brief, *supra* note 6, at 3–4.

136. *See id.*; *see also* Reddish, *supra* note 17 (arguing that President Trump’s pardon violated the due process rights of the individuals illegally detained).

137. Protect Democracy Brief, *supra* note 6, at 6–7. Thus, the Fifth and Fourteenth Amendments narrowed the powers in the Articles by requiring that these powers not violate an individual’s right to due process. *See id.*; *see also* U.S. CONST. amends. V, XIV. The brief also discusses in-depth how this case differs from that of *Ex parte Grossman*; the Arpaio case dealing with protecting private litigations rather than a public interest (for example, Prohibition) as used in *Grossman*. Protect Democracy Brief, *supra* note 6, at 8–11.

138. Josh Gerstein, *House Democrats Ask Judge to Reject Arpaio Pardon*, POLITICO (Sept. 27, 2017, 2:26 PM), <https://www.politico.com/blogs/under-the-radar/2017/09/27/house-democrats-judge-joe-arpaio-pardon-243216>. The brief was prepared by former Representative Brad Miller and lawyers Terry Goddard and Spencer Scharff. *Id.*

139. *Id.*

140. [Proposed] Memorandum of *Amici Curiae* Certain Members of Congress in Opposition to Defendant’s Motion for Vacatur and Dismissal with Prejudice at 9, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. Oct. 19, 2017), 2017 WL 6762012 [hereinafter Congressional Brief]. For more information on the historical reasoning behind presidential pardons, see *supra* Part II.

141. Congressional Brief, *supra* note 140, at 4, 9.

However, Democrats were not the only ones to speak out against the Arpaio pardon—Senator John McCain and Senator Jeff Flake, both Republican U.S. Senators from Arizona, condemned President Trump's decision.<sup>142</sup> Senator McCain released a statement that President Trump undermined his claims that he has respect for rule of law by pardoning Arpaio, who “has shown no remorse for his actions.”<sup>143</sup> Senator Flake stated that the judicial process should have been honored and allowed to “take its course.”<sup>144</sup> Republican Congresswoman Ileana Ros-Lehtinen from Florida also spoke out against the pardon.<sup>145</sup>

### 3. Academia

Perhaps the largest discussion around the pardon has occurred between scholars and legal journalists.<sup>146</sup> The day before the pardon, Martin Redish, a professor of constitutional law at Northwestern University, wrote an op-ed in the *New York Times* and followed it with an amicus brief, arguing that a pardon that allowed the President to disregard constitutional protections destroys constitutional checks and balances.<sup>147</sup> Redish states:

[A]nything in the body of the Constitution inconsistent with the directive of an amendment is necessarily pre-empted or modified by that amendment. If a particular exercise of the pardon power leads to a violation of the due process clause, the pardon power must be construed to prevent such a violation.<sup>148</sup>

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142. Katie Reilly, ‘No One Is Above the Law.’ *John McCain and Others Slam President Trump for Pardoning Joe Arpaio*, TIME (Aug. 26, 2017), <http://time.com/4917014/joe-arpaio-pardon-reaction-john-mccain-jeff-flake/>.

143. *Id.*; see *infra* Section IV.A (discussing the element of remorse in granting presidential pardons).

144. Jeff Flake (@JeffFlake), TWITTER (Aug. 25, 2017, 6:05 PM), <https://twitter.com/jeffflake/status/901249192257101825?lang=en>. Several days before pardoning Arpaio, Trump criticized Flake on Twitter, stating that Flake was “weak on crime & border!” Reilly, *supra* note 142.

145. Ileana Ros-Lehtinen (@RosLehtinen), TWITTER (Aug. 25, 2017, 7:12 PM), <https://twitter.com/roslehtinen/status/901265991082151936?lang=en> (speaking out against a “[p]ardon for [a] [s]heriff who specialized in tormenting immigrants”).

146. See *infra* notes 147–65 and accompanying text.

147. Redish, *supra* note 17; [Proposed] Brief of Amici Curiae Martin Redish, Free Speech for People and Coalition to Preserve, Protect and Defend in Opposition to Motion of Defendant Joseph Arpaio for Vacatur and Dismissal with Prejudice, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB (D. Ariz. Oct. 17, 2017), 2017 U.S. Dist. LEXIS 214888 [hereinafter Redish Brief].

148. Redish, *supra* note 17. Redish admits “this is a novel theory,” but argues pardons that do not

On the same day Redish filed his brief, established legal scholars Erwin Chemerinsky,<sup>149</sup> Michael E. Tigar,<sup>150</sup> and Jane B. Tigar<sup>151</sup> also filed an amicus brief.<sup>152</sup> Similar to Redish, Chemerinsky argued the Arpaio pardon was unconstitutional, providing three reasons: (1) Arpaio's contempt of court charge is not within the meaning of an "Offense" under the Constitution; (2) contempt of court charges are protected from pardons to allow Article III courts "to provide effective redress when a public official commits harm by violating the Constitution;" and (3) Article III courts have the power to enforce their orders outside of control from the legislative or executive branches.<sup>153</sup> Notably, the brief argues that the court's contempt power was listed separate from the court's right to try crimes and offenses, showing that "the inherent contempt power was not thought to be part and parcel of the power to try those accused of crime."<sup>154</sup> Chemerinsky argues this is displayed in *Ex parte Grossman*, because the criminal offenses of Grossman "were based on Congressional creations of criminal offenses" as opposed to judicial contempt charges, and thus, pardonable.<sup>155</sup>

Laurence H. Tribe, a professor of constitutional law at Harvard Law School, and Ron Fein, the legal director of Free Speech for People, also argued against the pardon, claiming that it can and should be overturned.<sup>156</sup> Using events that occurred at the University of Mississippi in 1962 as an example, Tribe and Fein noted that the Mississippi governor refused to comply with a court order to allow African Americans to be admitted to the University and was held in contempt.<sup>157</sup> It was the power of the courts that helped ensure Mississippi, and other states resisting desegregation, complied.<sup>158</sup> According

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protect due process could lead to tyranny, something the Framers were adamant about protecting against. *Id.*

149. Erwin Chemerinsky is the Dean of Berkeley Law and a professor of law. *Erwin Chemerinsky*, BERKELEY LAW, <https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/> (last visited Oct. 5, 2018).

150. Michael E. Tigar is Emeritus Professor of Law at Duke University School of Law and Washington College of Law. *About Michael Tigar*, TIGARBYTES, <http://tigarbytes.blogspot.com/p/about-me.html> (last visited Oct. 5, 2018).

151. Jane B. Tigar is an attorney. *Michael E. Tigar*, DUKE LAW, <https://law.duke.edu/fac/tigar/> (last visited Oct. 5, 2018).

152. See Chemerinsky Brief, *supra* note 27, at 1.

153. *Id.* at 1–2.

154. *Id.* at 10–11.

155. *Id.* at 3, 11 ("The 'contempt' mentioned in § 24 of the [National Prohibition Act] was not the 'contempt' to which the present 18 U.S.C. § 401 refers. Sec. 401 is complete unto itself.").

156. See Tribe & Fein, *supra* note 6.

157. *Id.*

158. *Id.*

to Tribe and Fein, without the courts power to hold individuals in contempt of court free of a promise of a presidential pardon, injustice can thrive.<sup>159</sup> The article noted that the language in the Constitution is permissive (“shall have Power”) but not unlimited, and that President Trump’s actions “should trigger congressional hearings” to determine whether this pardon is an impeachable offense.<sup>160</sup>

However, Amelia Thomson-DeVeaux and Andrea Jones-Rooy from FiveThirtyEight<sup>161</sup> have pointed out that, although the pardon may be unpopular, it has precedent.<sup>162</sup> Thomson-DeVeaux and Jones-Rooy break up their article in sections, such as “Pardoning someone who’s violated civil rights” and “Pardoning someone who flouted the legal system,” and cite to examples in which presidents have legally used pardons in situations similar to that of the Arpaio pardon.<sup>163</sup> For example, Thomson-DeVeaux and Jones-Rooy noted that in 1981, President Reagan pardoned W. Mark Felt and Edward S. Miller, who were former FBI agents “convicted of conspiring to violate the constitutional rights of anti-war radicals in the early 1970s;” while in 2001, President Clinton pardoned Marc Rich who was on the FBI’s “Most Wanted List.”<sup>164</sup> Although none of these cases are perfect copies of the Arpaio pardon, and each case has varying types of offenses, history shows the wide breadth of the presidential pardon.<sup>165</sup>

#### 4. Arpaio and the Department of Justice

Most of the critics’ viewpoints focus primarily on whether or not the pardon is moral or constitutionally valid; Arpaio and the DOJ took a drastically different stance.<sup>166</sup> During the pardon hearing in October, Arpaio did not just

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159. *Id.* (“The message to segregationist officials would have been clear: just ignore federal court integration orders; the president will have your back if the court tries to enforce them through its contempt power.”).

160. *Id.*

161. FiveThirtyEight, owned by ABC News, gathers and analyzes polling and political data. Nate Silver, *Frequently Asked Questions*, FIVETHIRTYEIGHT (last modified Aug. 7, 2008), <https://fivethirtyeight.com/features/frequently-asked-questions-last-revised/>.

162. Amelia Thomson-DeVeaux & Andrea Jones-Rooy, *The Arpaio Pardon Has Plenty of Precedents . . . That Got Other Presidents in Trouble*, FIVETHIRTYEIGHT (Aug. 29, 2017, 6:52 AM), <https://fivethirtyeight.com/features/the-arpaio-pardon-has-plenty-of-precedents-that-got-other-presidents-in-trouble/>.

163. *Id.*

164. *Id.* For more on Marc Rich, see *supra* Section II.C.2.b.

165. Thomson-DeVeaux & Jones-Rooy, *supra* note 162.

166. Kyle Swenson, *Federal Judge Refuses to Erase Joe Arpaio’s Conviction Despite Trump*

push to have the pardon approved but additionally requested the court to retroactively clear the criminal history on Arpaio's record<sup>167</sup>—and the DOJ agreed.<sup>168</sup> In light of the pardon, the DOJ filed a brief to the U.S. District Court for the District of Arizona stating that “the Court should vacate all orders and dismiss the case as moot,” which would erase the court's previous findings that: (1) Arpaio was violating the law; and (2) Arpaio was in contempt of court.<sup>169</sup> The judge did accept the pardon, but refused to vacate the case, stating that a pardon “is an executive prerogative of mercy, not of judicial recordkeeping,” thus it would be improper to vacate all the rulings, because Arpaio was found to be in contempt.<sup>170</sup> “The pardon undoubtedly spared [Arpaio] from any punishment that might otherwise have been imposed. It did not, however, ‘revise the historical facts’ of this case.”<sup>171</sup>

#### IV. ANALYSIS

Using the historical and legal context of presidential pardons as a backdrop, three questions must be asked about the Arpaio pardon: (1) is it really different from other pardons; (2) does it violate the Constitution; and (3) how does it impact the Trump Administration legally and politically?<sup>172</sup>

##### *A. Similarities and Differences with Previous Pardons*

There are some notable similarities and differences between the Arpaio

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*Pardon*, WASH. POST (Oct. 20, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/20/federal-judge-refuses-to-erase-joe-arpaio's-conviction-despite-trump-pardon/>.

167. *Id.* Arpaio claimed that because he had not been sentenced, the case is now moot. Matt Zapotosky, *Justice Dept. Supports Arpaio's Post-Pardon Bid to Have Guilty Finding Thrown Out*, WASH. POST (Sept. 11, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/09/11/justice-dept-supports-arpaio's-post-pardon-bid-to-have-guilty-finding-thrown-out/> (“Because the President issued a pardon before sentencing and judgment—and clearly, before the conclusion of any appeals—the Court is obligated to vacate its verdict and all other orders in this matter, and to dismiss the case with prejudice. . . . Because Defendant will never have the benefit or opportunity to seek a reversal of the court's verdict through appeal (and a retrial by jury), it is only fair that the Court vacate its verdict and all other rulings in the case.”).

168. Swenson, *supra* note 166. The DOJ's Public Integrity Section argued that because the pardon was given before Arpaio's sentencing, the case is moot. *See* Zapotosky, *supra* note 167.

169. Zapotosky, *supra* note 167.

170. *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 U.S. Dist. LEXIS 182254 at \*7 (D. Ariz. Oct. 19, 2017) [hereinafter *Arpaio Order*].

171. *Id.* (citing 67A C.J.S. *Pardon & Parole* § 33 (2018)).

172. *See supra* Sections III.A.1–3; *see infra* Sections IV.A–C.



pardon and past pardons.<sup>173</sup> Looking first at similarities, President Trump, like many presidents before him, pardoned an unpopular individual.<sup>174</sup> As discussed by Thomson-DeVeaux and Jones-Rooy, ever since President Ford's pardon of President Nixon, succeeding presidents have each chosen several high-profile—and typically unpopular—individuals to pardon.<sup>175</sup> Although most presidents wait until late in their term to make these pardons, the fact that people are outraged over President Trump's pardon is nothing new.<sup>176</sup>

Similarly, it is not the first time that a public official has been pardoned.<sup>177</sup> In addition to President Reagan's pardon of two former FBI agents guilty of conspiring to obstruct individuals' constitutional protections,<sup>178</sup> President Carter signed legislation restoring Jefferson Davis's citizenship,<sup>179</sup> and President Ford pardoned President Nixon.<sup>180</sup> Restoring Jefferson Davis's citizenship, particularly, could be seen as representing the same endorsement of racism that activist groups worry the Arpaio pardon represents.<sup>181</sup> Neither Arpaio nor Davis felt remorse for their actions.<sup>182</sup> In 1884, in front of the Mississippi legislature, Davis said:

Tis been said that I should apply to the United States for a pardon, but repentance must precede the right of pardon, and I have not repented. Remembering as I must all which has been lost, disappointed hopes and crushed aspirations, yet I deliberately say, if it were to do over again I would do just as I did in 1861.<sup>183</sup>

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173. See generally Part III.

174. See Thomson-DeVeaux & Jones-Rooy, *supra* note 162 (comparing the Arpaio pardon to other unpopular presidential pardons). See generally *supra* Sections II.C, III.A.1–3.

175. See Thomson-DeVeaux & Jones-Rooy, *supra* note 162. A list of recent controversial pardons can be found in Section II.C.2.

176. See Thomson-DeVeaux & Jones-Rooy, *supra* note 162 (“[A]t least since then-President Gerald Ford’s pardon of Richard Nixon in 1974, chief executives have also issued a handful of attention-grabbing pardons that deviated from this normal practice and tended to be both controversial and unpopular.”).

177. See *id.*

178. See *id.*

179. See Carter, *supra* note 98.

180. See Proclamation 4311, *supra* note 10.

181. See *supra* Section III.A.1.

182. See Francis MacDonnell, *Reconstruction in the Wake of Vietnam: The Pardoning of Robert E. Lee and Jefferson Davis*, 40 CIV. WAR HIST. 119, 121 (Kent St. Univ. Press ed. 1994); Arpaio Tweet, *supra* note 114 (calling his arrest a “political witch hunt”).

183. MacDonnell, *supra* note 182, at 121–22. It is interesting to note that Davis believed part of pardoning required repentance, while Chief Justice Taft and several past presidents have only

President Reagan's pardon also speaks to critics who feel that President Trump is condoning or encouraging an illegal activity.<sup>184</sup> That pardon has notable similarities to the Arpaio pardon.<sup>185</sup> Both concerned individuals violating the constitutional protections of third parties, and both pardons discussed the individuals' long service to the United States as reason for the pardon.<sup>186</sup>

The Jefferson Davis resolution and Felt and Miller's pardon create serious doubts that there were any problems with Arpaio's pardon.<sup>187</sup> Nonetheless, there are some distinct differences.<sup>188</sup> President Carter and President Reagan both had very different tones in their statements of clemency than President Trump had in his.<sup>189</sup> President Carter focused on reuniting the country and putting the past away,<sup>190</sup> and President Reagan focused on Felt and Miller's innocent intent and the fact that they had gone through the hardship of a three-year criminal proceeding.<sup>191</sup> President Trump provided very limited information on why Arpaio deserved a pardon apart from his years of service.<sup>192</sup> The pardon's absence of reasoning does not mean that there are not similar justifications to the ones put forward by President Carter and President Reagan, but it does leave speculation as to which of Chief Justice Taft's justifications President Trump rests his pardon on, if any.<sup>193</sup>

Arpaio's pardon is also unique in regard to the admission of guilt from

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discussed undue hardship or evident mistake. *See Ex parte Grossman*, 267 U.S. 87, 120 (1925); Proclamation 4311, *supra* note 10; Siddiqui & Pilkington, *supra* note 95. *But see* Lacovara, *supra* note 48 ("As the Founding Fathers made plain, the purpose behind the pardon power is to extend mercy to those who have offended and have demonstrated remorse.").

184. *See* Thomson-DeVeaux & Jones-Rooy, *supra* note 162.

185. *Compare Arpaio Pardon*, *supra* note 113, *with* Reagan, *supra* note 102.

186. *Compare Arpaio Pardon*, *supra* note 113 (noting that President Trump commended Arpaio on his "more than fifty years of admirable service to [the] Nation"), *with* Reagan, *supra* note 102 (discussing Felt and Miller's "long careers . . . serv[ing] the [FBI] and [the] nation with great distinction").

187. *See generally* Carter, *supra* note 98; Reagan, *supra* note 102.

188. *See infra* notes 189–206 and accompanying text.

189. *Compare* Carter, *supra* note 98, *and* Reagan, *supra* note 102, *with Arpaio Pardon*, *supra* note 113. James Fallows, President Carter's speechwriter at the time of the Jefferson Davis legislation, also points out that there is a difference between President Trump issuing a pardon and President Carter signing a congressional resolution. *See* Fallows, *supra* note 116. The law President Carter signed was Senate Joint Resolution 16, A Joint Resolution to Restore Posthumously Full Rights of Citizenship to Jefferson F. Davis, introduced by Senator Mark Hatfield. S.J. Res. 16, 95th Cong. (1977) (enacted).

190. *See* Fallows, *supra* note 116.

191. *See* Reagan, *supra* note 102.

192. *See Arpaio Pardon*, *supra* note 113.

193. *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (noting that the pardon is intended to prevent undue hardship or evident mistake).

the pardon-seekers; most pardons concede guilt and focus on the harshness of the sentence, while the Arpaio pardon hints at Arpaio's innocence and ignores any harshness factor.<sup>194</sup> President Reagan<sup>195</sup> and President Obama<sup>196</sup> both made it clear that the clemency recipients were guilty of crimes,<sup>197</sup> while President Clinton implied he did not know if his pardon-seekers were guilty or innocent, but required they waive any defense to civil fines and penalties so they could be fined if they were guilty.<sup>198</sup> This follows the decision in *Burdick* that stated if an individual accepts a pardon, guilt will be implied.<sup>199</sup> In Arpaio's pardon, the White House did not mention Arpaio's guilt and instead commended Arpaio on "his life's work of protecting the public from the scourges of crime and illegal immigration," the very action for which Arpaio was found guilty.<sup>200</sup>

As mentioned, under *Burdick*, it would normally be assumed that Arpaio accepted guilt.<sup>201</sup> However, after accepting the pardon, Arpaio affirmatively denied his guilt on Twitter, calling his contempt charge "a political witch

194. See *Arpaio Pardon*, *supra* note 113 (discussing Arpaio's lifelong work "protecting the public from the scourges of crime and illegal immigration").

195. See Reagan, *supra* note 102 (stating that Felt and Miller "never denied their actions . . . [and] came forward to acknowledge [their actions] publicly in order to relieve their subordinate agents from criminal action[]").

196. See Savage, *supra* note 93 (claiming that other wrongdoers would be dissuaded from Manning's punishment); see also Siddiqui & Pilkington, *supra* note 95.

197. President Carter is not included in this list because he did not issue a pardon. See Fallows, *supra* note 116 (noting that President Carter signed a congressional resolution). However, in signing the resolution, President Carter did say that Davis was guilty of his crimes. See Carter, *supra* note 98 (noting "the guilts" of the past).

198. See Clinton, *supra* note 86 ("I did not know what personal liability the individuals might still have for Energy Department or other violations. . . . I required them to waive any and all defenses, including their statute of limitations defenses, to any civil charge the government might bring against them."). President Clinton's pardon for Marc Rich and Pinchus Green is tricky because President Clinton dances around their innocence. *Id.* ("If the two men were wrongly indicted in the first place, justice has been done. On the other hand, if they do personally owe money for Energy Department penalties, unpaid taxes or civil fines, they can now be sued civilly . . ."). However, his justification for their innocence was not that tax evasion is not a crime, but rather that the investigative work was incorrect, as opposed to President Trump, who has implied the court was wrong to stop Arpaio from detaining suspected undocumented immigrants. See *id.*; Rudalevige, *supra* note 14 (quoting Trump at a rally stating, "Sheriff Joe was convicted for doing his job.").

199. *Burdick v. United States*, 236 U.S. 79, 94 (1915).

200. *Arpaio Pardon*, *supra* note 113 (quoted material); see also Rudalevige, *supra* note 14 (stating Trump believes Arpaio's sentence was unjust because he was just "doing his job").

201. Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L. J. 959, 960–61 (1997) (stating that the majority of modern courts believe a pardon erases the conviction but keeps the guilt). If the pardon was in accordance with the Office of the Pardon Attorney's standards, Arpaio would also likely need to show some signs of remorse, which are not present. See *Standards for Consideration*, *supra* note 59.

hunt.”<sup>202</sup> President Nixon also did not confirm or deny his guilt,<sup>203</sup> but that was partly because he had not yet been tried.<sup>204</sup> President Ford argued the pardon was necessary because, regardless of guilt, Nixon had already suffered enough hardship and he would not receive an unbiased trial.<sup>205</sup> The same set of facts were not at play in Arpaio’s case—Arpaio had already been found in contempt of court for his actions, and President Trump did not reference any undue hardship Arpaio faced or indications that he would face an unfair trial.<sup>206</sup>

In light of Arpaio’s tweet and President Trump’s statement that Arpaio was arrested “for doing his job,” it might be presumed that the White House was granting the pardon under the notion that there was an evident mistake.<sup>207</sup> If this were true, it would make sense why the White House did not explicitly state this in its press release—it could be perceived as an attack on the judiciary and may encourage more judges to consider arguments that the pardon was unconstitutional.<sup>208</sup> However, this is likely not the type of “evident mistake” Chief Justice Taft was referring to in *Ex parte Grossman*.<sup>209</sup> In Arpaio’s case, the court did not have the wrong defendant; it did not use clearly erroneous facts; and it did not misunderstand the intent of Arpaio’s actions.<sup>210</sup>

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202. See Arpaio Tweet, *supra* note 114. Arpaio ran for U.S. Senate on a platform of strict immigration. See Bradner, *supra* note 113.

203. See Proclamation 4311, *supra* note 10; see also Zapotosky, *supra* note 167 (stating that Arpaio had not been sentenced at the time of his pardon).

204. See Proclamation 4311, *supra* note 10 (stating that if President Nixon were to be tried, he would not receive a fair trial).

205. See Proclamation 4311, *supra* note 10. There are also claims that Nixon’s agreement to the pardon was contingent on the knowledge that he was accepting guilt of his crimes, but these were never addressed publicly. Law Journal Editorial Board, *Accepting a Pardon Means Admission of Guilt*, 223 N.J. L.J. 22 (Aug. 28, 2017, 12:27 AM), <https://www.law.com/njlawjournal/almID/1202796636296/Accepting-a-Pardon-Means-Admission-of-Guilt/>.

206. See *Arpaio Pardon*, *supra* note 113; see also Fallows, *supra* note 116 (stating that a President Bush appointed judge ordered Arpaio to cease-and-desist his racial profiling activities); but see Rudalevige, *supra* note 14 (stating Trump claimed that the sentence was unjust).

207. See Rudalevige, *supra* note 14.

208. See *infra* note 233 and accompanying text. This comment is not meant to imply that a judge would be less impartial, merely that the White House did not want to create any more tension between the Trump Administration and the Judiciary Branch.

209. *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (noting that it is an “evident mistake in the operation or enforcement of the criminal law”).

210. *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 U.S. Dist. LEXIS 214888, at \*26 (D. Ariz. July 31, 2017) [hereinafter *Arpaio Contempt*] (“The evidence at trial proves beyond a reasonable doubt and the Court finds that Judge Snow issued a clear and definite order enjoining Defendant from detaining persons for further investigation without reasonable suspicion that a crime has been or is being committed; that Defendant knew of the order; and that Defendant willfully violated the order by failing to do anything to ensure his subordinates’ compliance and by directing them to

And President Trump and the White House do not try to make a claim otherwise.<sup>211</sup> Instead, it appears President Trump disagreed with the judge's decision not on a legal basis, but on a political one.<sup>212</sup>

There are certainly notable differences between this pardon and past pardons, but the Arpaio pardon *looks* like other pardons, and without a clear indication of what a presidential pardon requires, that may be enough.<sup>213</sup>

### *B. Is It Constitutional?*

Analyzing the constitutionality of the Arpaio pardon requires looking beyond past pardons and the public's general dislike of pardons, and instead focusing on actual constitutional questions; Martin Redish's argument in his New York Times Op-Ed, "A Pardon for Arpaio Would Put Trump in Uncharted Territory," and his amicus brief are good places to start.<sup>214</sup> Redish argued that pardons cannot impede on a third party's right to due process, and thus, by pardoning Arpaio of his criminal charges and preventing a third party from bringing claims, President Trump violated the Constitution.<sup>215</sup> Although such a claim seems to go against the centuries of precedent that the Constitution<sup>216</sup> grants the president broad discretion over pardons,<sup>217</sup> Redish stated that amendments to the Constitution, such as the Fifth and Fourteenth Amendments providing due process, preempt the articles of the Constitution, including Article II, Section 2.<sup>218</sup> Thus, the argument goes that because Article V allows amendments to be made to the Constitution, once the Fifth and Fourteenth Amendments were ratified, the president's pardoning power was limited not only in cases of impeachment, but also in cases that would obstruct

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continue to detain persons for whom no criminal charges could be filed. Because the Court finds that Defendant willfully violated an order of the court, it finds Defendant guilty of criminal contempt.").

211. See *Arpaio Pardon*, *supra* note 113.

212. See *Arpaio Contempt*, *supra* note 210, at \*26 (stating that Defendant knew the order and "willfully violated" it).

213. See generally *supra* notes 174–212 (noting similar pardons that were unpopular, pardoning public officials, and excusing violations of constitutional rights, while also stating Arpaio's pardon differed in tone, justification, and acceptance of guilt usually present in pardons). This goes to the point that President Trump believed that Arpaio was just doing his job. See Rudalevige, *supra* note 14.

214. See Redish, *supra* note 17; Redish Brief, *supra* note 147.

215. See Redish, *supra* note 17; see also Protect Democracy Brief, *supra* note 6, at 2, 4–7.

216. U.S. CONST. art. II, § 2, cl. 1; see also Liptak, *supra* note 32 and accompanying text.

217. *Ex parte Garland*, 71 U.S. 333, 380 (1866); see also *United States v. Klein*, 80 U.S. 128, 147 (1871) ("To the executive alone is [e]ntrusted the power of pardon; and it is granted without limit.").

218. See Redish, *supra* note 17; see also U.S. CONST. art. V (stating that amendments can be made to the Constitution).

an individual's due process.<sup>219</sup>

Furthermore, although case law would seem to suggest that the president may pardon as he sees fit in federal cases—and perhaps within the undue hardship or evident mistake requirements,<sup>220</sup> but this seems to be a rather flexible standard<sup>221</sup>—the courts have designated some limits.<sup>222</sup> One such limit, as discussed in *Grossman*, is civil contempt of court cases.<sup>223</sup> In Chief Justice Taft's decision, he discussed the history of pardons, noting that the English King's pardon could not “infringe upon the rights of others,” which occurred during civil contempt.<sup>224</sup> In most instances, this assertion is probably correct.<sup>225</sup> However, when Arpaio was held in criminal contempt, he had not only violated the rules of the United States, he also violated the due process rights—articulated by the Fifth and Fourteenth Amendments—of the individuals he stopped and interrogated.<sup>226</sup> Arpaio's pardon “infring[ed] [on] the rights of others” and thus, extends beyond the scenario of criminal contempt of court for selling liquor during Prohibition discussed in *Ex parte*

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219. U.S. CONST. art. V; see Protect Democracy Brief, *supra* note 6, at 4–7.

220. *Ex parte Grossman*, 267 U.S. 87, 120 (1925); see also Congressional Brief, *supra* note 140, at 4–5 (citing *Grossman*, 267 U.S. at 120).

221. See generally *supra* Section II.C (explaining that undue hardship has applied to individuals who have not served jail time and evident mistake has applied to men fleeing the country to evade tax fraud).

222. U.S. CONST. art. II, § 2, cl. 1 (stating that pardons cannot be granted in cases of impeachment); *Grossman*, 267 U.S. at 111 (stating that pardons cannot be granted in cases of civil contempt of court); *Burdick v. United States*, 236 U.S. 79, 91 (1915) (stating that pardons do not go into effect until the pardon-seekers accept them).

223. *Grossman*, 267 U.S. at 111 (“For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it.”).

224. See *id.*; Lardner, *supra* note 44, at 141–42. Chemerinsky also looked at the King's pardoning power in his brief and noted that the King did not have the power to pardon a criminal wrongdoer that would “deprive a private litigant of rights nor to curtail the judicial power of royal courts to vindicate the rights of a private litigant.” See Chemerinsky Brief, *supra* note 27, at 5. Thus, just as the King could not pardon an individual that would “prejudice the right of an injured person to prosecute a criminal appeal,” Chemerinsky argues President Trump cannot pardon Arpaio and deprive third parties of their right of protection and prosecution. *Id.* at 4.

225. See, e.g., *Grossman*, 267 U.S. at 107 (Grossman's actions did not interfere with rights of third parties when he sold liquor in violation of Prohibition). But see Chemerinsky Brief, *supra* note 27, at 3, 11–12 (discussing how the term “contempt” in *Ex parte Grossman* was different than judicial contempt); Protect Democracy Brief, *supra* note 6, at 9, 11 (discussing how the Arpaio pardon is different from the Grossman pardon in regard to infringing the rights of others).

226. Compare Redish, *supra* note 17 (noting that Arpaio was found in criminal contempt of court for disobeying an “order against prolonging traffic patrols targeting immigrants”), with *Grossman*, 267 U.S. at 107 (Grossman was found violating a restraining order that prohibited the selling of alcohol and held in contempt for “maintaining a nuisance at his place of business.”).

*Grossman*.<sup>227</sup>

Therefore, Arpaio's pardon does not use either of the two justifications for a pardon laid out in *Grossman*;<sup>228</sup> Arpaio has not expressed remorse or repentance for his actions as the Office of the Pardon Attorney suggests;<sup>229</sup> Arpaio's pardon was never approved by the Office of the Pardon Attorney;<sup>230</sup> and Arpaio's pardon deprives innocent third parties of their right to due process.<sup>231</sup> Although the pardon *looks* like other pardons, in practice it does not serve the purposes of a pardon,<sup>232</sup> and assertions that the "President has the complete power to pardon" are misleading.<sup>233</sup> There are limits on presidential pardons and there is certainly a valid argument that President Trump may have crossed them.<sup>234</sup>

Thus, Redish's argument helps explain why the Arpaio pardon feels unjust to many.<sup>235</sup> However, courts appear to be unwilling to engage with this argument.<sup>236</sup> Redish and Protect Democracy put forward the due process argument in their amicus briefs sent to the court for Arpaio's October hearing, but it did not receive support from the court.<sup>237</sup> While this does not mean that the argument does not have merit, it may indicate that the courts are not ready

227. See Lardner, *supra* note 44, at 141–42. Others agree with this argument. See Protect Democracy Brief, *supra* note 6, at 3, 8–9, 11; see also *supra* note 155 and accompanying text.

228. See Congressional Brief, *supra* note 140, at 9 ("President Trump does not pretend that his pardon of the Defendant [Arpaio] is based upon the considerations of grace that usually justify the exercise of the pardon power.").

229. See *supra* note 202 and accompanying text (discussing Arpaio's tweet to President Trump and his Senate race); *Standards for Consideration*, *supra* note 59.

230. See Rudalevige, *supra* note 14 (noting that the DOJ's pardon attorney was not notified before the Arpaio pardon).

231. See *supra* note 226–27 and accompanying text.

232. Referring to both Chief Justice Taft's and Alexander Hamilton's reasoning for pardons. *Grossman*, 267 U.S. at 120; see Hamilton, *supra* note 1.

233. See Trump Tweet, *supra* note 3.

234. See *supra* note 222 and accompanying text. However, this is not to say that President Trump intended to act unconstitutionally. See Trump Tweet, *supra* note 3 (noting his belief that the president has "the complete power to pardon"). His understanding of the pardoning power, like many others, has misinterpreted broad powers to mean complete powers, which is why it is important the Court set the record straight. See *id.*; see *infra* note 239 and accompanying text.

235. See ACLU Petition, *supra* note 119 (gathering over 100,000 signatures to request the Trump Administration not to pardon Arpaio).

236. See Arpaio Order, *supra* note 170, at 7–8 (approving the pardon regardless of the Redish brief and the Protect Democracy brief both opposing the pardon and providing a due process argument).

237. See Protect Democracy Brief, *supra* note 6, at 4–7; Redish Brief, *supra* note 147, at 2–7.

to confront this issue.<sup>238</sup> This is likely the case at the Supreme Court as well.<sup>239</sup> The current Court is more conservative than it has been in decades, especially with the recent addition of Justices Gorsuch and Kavanaugh, both originalists.<sup>240</sup>

Beyond the conservative tendency of the bench, the Court would likely not take up any case to constrain presidential pardons unless a clear violation occurred because the pardon is supposed to be seen as a power to check the judiciary.<sup>241</sup> If the Court did not have a strong reason for narrowing this executive power, it could appear to be consolidating power.<sup>242</sup> However, as William Duker mentioned in his 1977 article on presidential pardons and as Tribe and Fein noted when discussing the Mississippi Governor's pardon, the only way we solve these difficult constitutional issues is with the courts.<sup>243</sup> Now is not the time for the Court to worry if it is staying in its lane, and until it chooses to expressly state whether a pardon can violate constitutional amendments and what limits, if any, there are on pardons, there will not be any resolution on this issue.<sup>244</sup>

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238. Compare Arpaio Order, *supra* note 170, at \*7–8 (finding that the court could not rule on the motion before the government had responded and the Defendant had issued a reply), with Protect Democracy Brief, *supra* note 6, at 11 (demonstrating the courts acceptance of the pardon, even with the knowledge that it violates third parties' right to due process). It is important to focus on how courts view the pardoning power because "[a]lthough the Constitution confers the pardoning power on the President in general terms, the judiciary has served as the supreme interpreter of the scope of the constitutional powers since *Marbury v. Madison*." Duker, *supra* note 32, at 506.

239. See Garrett Epps, *How Will the Supreme Court Respond to the Arpaio Pardon?*, THE ATLANTIC (Aug. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/08/how-will-the-courts-respond-to-the-arpaio-pardon/538137/> (arguing that even if Supreme Court justices appear to be against Trump's policies, they often align with what the President wants).

240. Lydia Wheeler, *Supreme Court Enters New Era, Raising Conservative Hopes*, THE HILL (Apr. 8, 2017, 12:04 PM), <http://thehill.com/regulation/court-battles/327884-supreme-court-entering-new-era> (noting that Justice Gorsuch is more conservative than Justice Scalia); Alex Swoyer, *Brett Kavanaugh Best Described as an Originalist, say Legal Scholars*, WASH. TIMES (Sep. 3, 2018), <https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/>. A more conservative court is reminiscent of the Taft Court that decided *Ex parte Grossman*, and thus, may make the same determinations. See *Grossman*, 267 U.S. at 122.

241. See *supra* note 8 and accompanying text; Epps, *supra* note 239 (noting the court's timidity to go against the administration and providing examples with President Wilson and President Nixon).

242. See Mondale, *supra* note 8 (pointing out that the original purpose of the pardoning power was a check on the judiciary branch).

243. See Duker, *supra* note 32, at 506 (stating that the judiciary is the "supreme interpreter" of constitutional powers); Tribe & Fein, *supra* note 6.

244. See Duker, *supra* note 32, at 506; see also Epps, *supra* note 239 (questioning whether the Supreme Court would stand up to the Trump Administration).



*C. Legal and Political Impact*

Even without judicial review, the Arpaio pardon has created serious legal and political ramifications for the Trump Administration.<sup>245</sup>

President Trump will likely not face any legal proceedings because of the Arpaio pardon.<sup>246</sup> However, the Arpaio investigations garnered large public attention, including the attention of special counsel Robert Mueller.<sup>247</sup> Just five days after President Trump issued Arpaio's pardon,<sup>248</sup> news reports came out that Mueller was working with the New York Attorney General to bring state charges against Paul Manafort,<sup>249</sup> who would not be protected from a presidential pardon, showing the President's pardon may have encouraged some law enforcement to be more strategic in their arrests.<sup>250</sup> Concerns remain that President Trump will still use pardons to undermine the Russia investigation, but with law enforcement and the public on notice, it is likely the Trump Administration will use more discretion or potentially face

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245. See *infra* text accompanying notes 246–51.

246. See Epps, *supra* note 239 (noting that the Supreme Court will likely not pick up the Arpaio pardon). Beyond the Supreme Court's probable unwillingness to touch the Arpaio case because pardons are a constitutional check on the judiciary branch, the Court's now conservative majority would likely read Article II, section 2 very literally, maintaining the pardoning power's broad scope. See Wheeler, *supra* note 240 (discussing how the Supreme Court is becoming more conservative). Also note, this Comment should not be interpreted as arguing whether President Trump should or should not face legal liability; the focus is on the scope of the pardoning power.

247. Josh Dawsey, *Mueller Teams Up with New York Attorney General in Manafort Probe*, POLITICO (Aug. 30, 2017, 7:26 PM), <https://www.politico.com/story/2017/08/30/manafort-mueller-probe-attorney-general-242191>. Before President Trump pardoned Arpaio, his Administration was already being investigated over possible collusion with the Russian government in the 2016 elections. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html> (stating special counsel Robert Mueller was investigating potential ties “between President Trump’s campaign and Russian officials” in May 2017, three months before the Arpaio pardon).

248. Compare Davis & Haberman, *supra* note 4 (noting that Trump openly discussed pardoning Arpaio before officially doing so), with Dawsey, *supra* note 247 (stating that Trump has privately discussed the potential pardoning of Paul Manafort).

249. See Dawsey, *supra* note 247.

250. See *id.*; Fred Barbash, *Trump and Manafort Get Big Reminder That Pardon Power Does Not Extend to State Crimes*, WASH. POST (Aug. 31, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/31/trump-and-manafort-get-big-reminder-that-pardon-power-does-not-extend-to-state-crimes/> (noting that Presidential pardons do not apply to state crimes and discussing special counsel Robert Mueller working with New York’s attorney general to investigate Manafort); see also Sean Illing, *10 Legal Experts on Why Trump Can't Pardon His Way Out of the Russia Investigation*, VOX, <https://www.vox.com/2017/8/29/16211784/flynn-charged-fbi-trump-pardon-mueller-russia> (last visited Oct. 25, 2018) (stating that anyone President Trump pardons could be prevented from pleading the Fifth, and thus, may have to testify against President Trump).

impeachment.<sup>251</sup>

But the biggest impacts may come politically.<sup>252</sup> Handing out a controversial pardon early in his term opened up President Trump to widespread criticism and scrutiny over his decision, making additional pardons more politically risky.<sup>253</sup> Especially with low approval ratings and re-election campaigns starting next year, Trump will have to lay low on further pardons.<sup>254</sup> The Arpaio pardon also might affect President Trump's ability to implement immigration reform.<sup>255</sup> The pardon was largely seen as President Trump condoning Arpaio's activities and his stance on immigration.<sup>256</sup> In response, many Democrats in Congress opposed the pardon and will likely be critical of any immigration proposals from President Trump.<sup>257</sup> This will make future compromises on immigration legislation especially difficult, as the Arpaio pardon only further pushed Democrats to request more protection for undocumented immigrants.<sup>258</sup>

These impacts are all reasons many presidents choose to wait until the end of their terms before granting pardons.<sup>259</sup> Although the Arpaio pardon

251. See Illing, *supra* note 250 (acting as an example of the widespread concern that President Trump may use presidential pardons as a tool to hide illegal activity). If another situation occurred in which Congress was seriously looking at impeachment proceedings against President Trump, the Arpaio pardon may be used to establish a pattern of pardoning government officials in trouble for misconduct. See Protect Democracy Brief, *supra* note 6, at 1–4 (claiming that President Trump's actions were unconstitutional).

252. See *infra* text accompanying notes 253–60.

253. See *supra* Sections III.A.1–3 (showing criticism from activists, academics, and members of Congress). Since the Arpaio pardon, President Trump has granted six additional pardons, but none with the same constitutional or political issues present in the Arpaio pardon. *Pardons Granted by President Donald Trump*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (last visited Oct. 25, 2018).

254. See Jeremy Stahl, *Criminal Pardon*, SLATE (July 21, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/donald\\_trump\\_could\\_be\\_prosecuted\\_for\\_abusing\\_his\\_pardon\\_power.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/donald_trump_could_be_prosecuted_for_abusing_his_pardon_power.html).

255. Amber Phillips, *Trump Gave Arpaio a Break, But Their Immigration Cause Just Took a Legal Hit in Texas*, WASH. POST (Aug. 31, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/08/31/trump-gave-arpaio-a-break-but-their-immigration-cause-just-took-a-legal-hit-in-texas/> (noting that cities are challenging sanctuary city bans, arguing the ban “would encourage racial profiling from police, which is what Arpaio got in legal trouble for”).

256. See Illing, *supra* note 250.

257. See *supra* Section III.A.2; see also Gerstein, *supra* note 138 (noting that thirty democratic members of Congress urged courts to reject Arpaio's pardon).

258. See Phillips, *supra* note 255. See also *Trump Migrant Separation Policy: Children ‘in Cages’ in Texas*, BBC NEWS (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942> (discussing several democratic senators' outrage over the Trump Administration's treatment of undocumented children).

259. See *An Indefensible Pardon*, *supra* note 10. But see Reagan, *supra* note 102 (showing that

has become less of a focus in light of other important policy issues in 2017 and 2018, the pardon may continue to be brought up and could serve as encouragement to courts to take a closer look at the pardoning power.<sup>260</sup>

## V. CONCLUSION

Court cases discussing presidential pardons are not new.<sup>261</sup> The Court has a history of interpreting the pardoning power broadly, which has led to the belief that pardons are essentially unlimited.<sup>262</sup> This may be behind what seems to be a very loose interpretation of the limits of, and justification for, presidential pardons.<sup>263</sup> This interpretation also may be because there is not a clear enough test for determining presidential pardons.<sup>264</sup> Chief Justice Taft discussed two factors of consideration in *Ex parte Grossman*—namely to prevent undue hardship or evident mistake.<sup>265</sup> These are broad terms—likely intentionally so—but there must be a clear test on how courts should interpret them.<sup>266</sup>

It is also important for the Court to consider implementing a more official version of the remorse requirement.<sup>267</sup> The Office of the Pardon Attorney notes that this is an important factor in determining eligibility for a pardon,<sup>268</sup> and such a requirement would narrow the pardoning power and help prevent

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President Reagan pardoned Felts and Miller early in his Presidency).

260. See Illing, *supra* note 250 (noting how the Arpaio pardon is used in discussions about the Russia investigation); Phillips, *supra* note 255 (noting how the Arpaio pardon is used in discussions about sanctuary cities); Chuck Todd, Mark Murray, & Carrie Dann, *Republicans Break from Trump on Migrant Family Separation*, NBC NEWS (June 18, 2018, 5:49 AM), <https://www.nbcnews.com/politics/first-read/republicans-break-trump-migrant-family-separation-n884171> (comparing Republican members' response to the Arpaio pardon and the Trump Administration's treatment of migrant children).

261. See, e.g., *Ex parte Garland*, 71 U.S. 333 (1866); *United States v. Klein*, 80 U.S. 128 (1871); *Burdick v. United States*, 236 U.S. 79 (1915); *Ex parte Grossman*, 267 U.S. 87 (1925); *Biddle v. Perovich*, 274 U.S. 480 (1927).

262. *Garland*, 71 U.S. at 380 (“The power [to pardon] thus conferred is unlimited, with the exception [of impeachment].”).

263. *Grossman*, 267 U.S. at 120 (stating pardons should be granted to prevent undue hardship or in cases of evident mistake).

264. See *id.* (declining to define “undue hardship” or “evident mistake”).

265. *Id.*; see also Mondale, *supra* note 8, at 107 (“The pardon is the instrument of mercy and the way to correct those grave injustices . . .”).

266. See *Grossman*, 267 U.S. at 120; *Klein*, 80 U.S. at 147 (stating that the pardoning power was given to the Executive Branch “without limit”).

267. See *Standards for Consideration*, *supra* note 59 (stating that the DOJ considers whether the pardon-seeker has accepted responsibility).

268. *Id.*

extending mercy to individuals who may commit the same crime again or prevent victims from having their day in court.<sup>269</sup> This would also provide some conciliation to the American people that are routinely upset by a controversial pardon every four to eight years.<sup>270</sup>

Any of these clarifications would have likely prevented President Trump from pardoning Arpaio.<sup>271</sup> It is clear that Arpaio does not regret his actions,<sup>272</sup> and there is no indication that a pardon was necessary to prevent undue hardship<sup>273</sup> or that the judge made a mistake.<sup>274</sup> It is also clear that because of the Arpaio pardon, the individuals he unlawfully detained do not have a claim against him for limiting their due process rights.<sup>275</sup> Still, even if a federal judge believed President Trump's pardon was unconstitutional and outside the scope of the presidential pardon, the ultimate outcome would likely not change, because the current Supreme Court is not set up to make major changes to presidential pardons.<sup>276</sup>

This does not mean that the Arpaio pardon has not affected the presidential pardon.<sup>277</sup> The widespread outrage over the pardon has elevated discussions about presidential pardons, put law enforcement on notice of the limits of pardons in state actions, and we now understand constitutional issues that were not as clear before.<sup>278</sup> Ultimately, in order to ensure that President

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269. See *supra* Sections III.A.1–3. In writing this, I am aware that the purpose of the pardon is not the same purpose as the prison system, which is namely rehabilitation, restitution, or reform. See Austin McCormick, *The Prison's Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36, 48 (1950).

270. See *supra* note 162 and accompanying text.

271. See *Arpaio Pardon*, *supra* note 113 and accompanying text.

272. *Id.* (describing Arpaio tweeting that his contempt charge was all political and running on a Senate platform strict on immigration); see also *Arpaio Tweet*, *supra* note 114.

273. *Arpaio Pardon*, *supra* note 113 (referencing the absence of any discussion about the hardship Arpaio faced); see, e.g., Swenson, *supra* note 166 (stating that Arpaio was voted out of office, as opposed to resigning like President Nixon).

274. See *Arpaio Contempt*, *supra* note 210 (stating that “[t]he evidence at trial proves beyond a reasonable doubt and the Court finds that Judge Snow issued a clear and definite order enjoining Defendant from detaining persons for further investigation without reasonable suspicion that a crime has been or is being committed”).

275. See Redish, *supra* note 17.

276. See Epps, *supra* note 239 and accompanying text.

277. See *supra* Sections IV.C.1–2 (discussing the legal and political impacts of the Arpaio pardon on the Trump Administration).

278. Compare *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“The fact is that the judiciary, quite as much as Congress and the executive, are dependent on the co-operation of the other two, that government may go on. Indeed, while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary co-operation, in the possible reluctance of either of the other branches, to the force

Trump and future presidents keep within these limitations (whatever they may be), the Supreme Court will need to make a ruling.<sup>279</sup> But, for the purposes of the Arpaio pardon and limiting President Trump's pardoning power, although the courts refused to respond, the heightened scrutiny President Trump is under may have given critics the changes they hoped . . . for now.<sup>280</sup>

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of public opinion.”), with *Arpaio Pardon*, *supra* note 113 (stating that the Executive Branch issued a presidential pardon without concern for the other two branches because of Arpaio's “more than fifty years of admirable service to our Nation”).

279. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (noting in which circumstances the Supreme Court can overrule its previous decisions).

280. See *supra* Sections III.A.1–3.

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